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Supreme Court, U.S.
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No. 93-723

In The

Supreme Court of the United States

October Term, 1993

UNITED STATES OF AMERICA,

Petitioner,

v.

X-CITEMENT VIDEO, INC.;
and RUBIN GOTTESMAN,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

RESPONDENTS' BRIEF

[redacted]

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. section 2252 – which punishes as a felony the distribution and receipt of all expressive material visually depicting a minor engaging in sexually explicit conduct – violates the First and Fifth Amendments because:

a. Congress deliberately and unambiguously omitted knowledge of minority as an element of the crime.

b. The expansive definition of "sexually explicit conduct" – which includes the "actual or simulated lascivious exhibition of the genitals or pubic area of any person" – is vague and reaches a substantial amount of constitutionally protected expressive matter.

c. Defining a minor as a person under age 18, sweeps more broadly than is warranted by the evil at which the statute aims.

2. Whether 18 U.S.C. section 2252, as applied to respondents, violates the First and Fifth Amendments because the indictment does not allege that respondents knew that the person depicted was under 18 years of age.

3. Whether 18 U.S.C. section 2252, as applied to the respondents, violates the First Amendment because the videotapes are adult entertainment not "kiddie porn."

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RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The First Amendment provides in relevant part:

> Congress shall make no law . . . abridging the freedoms of speech, or of the press.

2. The Fifth Amendment provides in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

3. Article 1, section 1 of the Constitution provides:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

4. Article 1, section 7, cl. 2, provides in relevant part:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; if he approves he shall sign it . . . .

5. 18 U.S.C. § 2251 provides in relevant part:

> (c) (1) Any person who . . . knowingly makes . . . any notice or advertisement seeking or offering –
>
> (A) to receive . . . distribute, or reproduce, any visual depiction, if the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct, and such visual depiction is of such conduct . . . . shall be punished . . . .

6. 18 U.S.C. § 2252 provides in relevant part:

(a) Any person who –

(1) knowingly transports . . . in interstate . . . commerce . . . any visual depiction, if –

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct; or

(2) knowingly receives, or distributes, any visual depiction that has been transported . . . in interstate . . . commerce . . . if –

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct . . . shall be punished . . . .

7. The full text of 18 U.S.C. §§ 2251, 2252, and 2256 is set forth in the brief for the United States.

STATEMENT

A. On April 6, 1988, a federal grand jury filed a 12-count indictment against respondents. (JA 68-98.) Counts 1 to 8 charged respondents of one count of participating in an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. § 1986(c); one count of conspiring to commit that offense in violation of 18 U.S.C. § 1962(d); and six counts of using a common carrier to ship obscene material in interstate commerce in violation of 18 U.S.C.

§ 1462. (JA 68-88.) Counts 9, 10 and 11 contained one count of shipping child pornography in violation of 18 U.S.C. § 2252(a)(1); one count of distributing child pornography in violation of 18 U.S.C. § 2252(a)(2); and one count of conspiring to violate 18 U.S.C. § 2252, in violation of 18 U.S.C. § 371.[1]

Respondents moved to dismiss counts 9, 10 and 11 alleging, inter alia, that section 2252 is unconstitutional on its face because it does not contain a scienter-as-to-minority requirement, and that the indictment was fatally defective because it did not allege that respondents knew that the person depicted was under 18 years of age. (JA 144-147.) The court denied the motion to dismiss, concluding that section 2252 is constitutional; that the statute does imply a scienter requirement; and that the Government was required to prove scienter by showing that defendants knew that the person depicted in the videotapes was under 18 years of age. (*See* Pet. 40a-41a.)

B. The evidence at a bench trial showed that, in 1986 and 1987, an undercover police officer, posing as a retailer of adult videotapes, contacted Gottesman, the operator of X-Citement Video, Inc., a wholesaler, and expressed interest in buying videotapes featuring Traci Lords. Gottesman eventually sold two sets of such tapes; the first was a box of 49 tapes that he sold directly to the police officer; the second was a box of eight tapes that

[1] Count 12 alleged a violation of 18 U.S.C. §§ 992(g) and 924. It was separated from the rest of the case, and Gottesman was found not guilty of it. (JA 28-29.) Respondents were acquitted on counts 1-8 when the court found that the tapes were not obscene. (JA 114-118.)

Gottesman sold to the police officer and sent (in accordance with the police officer's instruction) to Hawaii. (Pet. 2a.)

The Government introduced newspaper articles dated July 18, and July 24, 1986, reporting that Traci Lords had appeared in sexually explicit films while she was under age 18. (JA 139-143.) Ms. Lord's first professional appearance was as a model in the September 1984 issue of *Penthouse* magazine, when she was 16 years of age. (JA 140.) She was considered one of the top adult film actresses in the country and made about 75 sexually explicit movies and videos while she was 16 and 17 years of age. (JA 140.)

On seeking employment as a performer, Ms. Lords provided a California driver's license, a U.S. passport, and a birth certificate, which stated that her name was Kristie Nussbaum and gave a birth date of November 17, 1962. (JA 142.) She showed the same identification to *Penthouse* before it published her pictures in its September 1984 issue. (JA 143.)

Gottesman testified that he knew of the rumors that Ms. Lords was under 18 years of age when she made the tapes, but that he believed she was in fact over 18 years. (JA 128.) He knew her personally, and over a three-year period he met with her between 40 and 50 times. (JA 120.) On one occasion, she borrowed $3,000 from him, stating that she had an opportunity to go to London for a modeling job. (JA 122.) Ms. Lords told Gottesman that she was married to Tom Byron, who was in virtually all of the movies she made. (JA 134.)

Gottesman believed that Ms. Lords falsely floated the rumor that she was under 18 when she made the tapes to drive the tapes from the market so that the new film she was in the process of making would be more valuable. In fact, she made about a million dollars from an adult movie she appeared in shortly after the newspaper articles appeared. (JA 128-129.)

C. At the close of the Government's case, (JA 99-113), and at the close of all the evidence, (JA 134-136), respondents moved for a judgment of acquittal on the grounds that section 2252 is unconstitutional on its face because it does not require scienter as to minority; that the indictment is constitutionally defective because it does not allege that respondents knew Traci Lords was under 18 years of age; and that the Traci Lords tapes were not "child pornography." Respondents submitted proposed findings of fact and conclusions of law, (JA 149-157), asserting, inter alia:

> Even if section 2252 could be rewritten to save it the indictment would still be fatally defective because it does not allege that defendants knew Traci Lords was under 18 years of age. *Russell v. United States*, 369 U.S. 749, 771 (1962). *Stirone v. United States*, 361 U.S. 212, 218 (1960). . . .

(JA 157.)

The court rejected respondents' arguments and entered findings of fact and conclusions of law, finding respondents guilty on the counts involving section 2252. (Pet. 37a-42a.) It concluded that section 2252 *implies* a scienter as to minority requirement because "to know the nature and character of child pornography almost by definition one must know that it depicts children." (Pet.

41a.) The court also concluded that the Government "was required to prove and did prove scienter by showing that [respondents] knew that the person depicted . . . was under 18 years of age." (Pet. 41a.) Subsequently, on remand, the court withdrew this conclusion and concluded that the Government met its burden when it proved that respondent Gottesman "had knowledge of the 'character and contents' of the material and that Mr. Gottesman was not a mere delivery person with no idea of whether the package contained books or widgets." (Pet. 35a.)

D. After respondents filed a notice of appeal, the Ninth Circuit decided *United States v. Thomas*, 893 F.2d 1066 (9th Cir.), *cert. denied*, 498 U.S. 826 (1990). *Thomas* held that the word "knowingly" used in section 2252 modifies only transports, ships, or receives and that it does not require that the defendant know that the material he transported, mailed or received involved a minor. "The section," *Thomas* stated, "requires only that Thomas knowingly transported and received the material." *Id.* at 1070.

Respondents then requested and obtained a remand to the district court for reconsideration in light of *Thomas*. (Pet. 30a.) On remand, the court concluded that "Congress specifically omitted a *mens rea* requirement for conviction under the statute in order to establish a *per se* rule making it illegal for persons to knowingly transport, ship, receive or distribute . . . the prohibited material involving sexual exploitation of minors." (Pet. 34a.) The court added that the Government met its burden "when it proved that defendant had knowledge of the 'character and contents' of the material." (Pet. 35a.)

E. The court of appeals reversed respondents' convictions. It held that section 2252 is unconstitutional on its face because it does not require scienter as to minority. (Pet. 5a.) In light of its ruling on the unconstitutionality of the Act, it did not address respondents' argument that the indictment was fatally defective, (Pet. 4a n.3), nor did it reach respondents' argument that the tapes were not "child pornography," and that the Act was therefore unconstitutionally applied. (Pet. 5a). Finally, the court rejected respondents' submission that the statute is unconstitutionally vague and overbroad because, inter alia, it defines sexually explicit conduct too broadly. (Pet. 5a-8a.)

In the court of appeals, the Government argued that section 2252 requires knowledge of "the nature and character of the material." This position, the court responded, "is a bit cagey; it suggests at times that the statute requires that the distributor know that the material is child pornography, but . . . . seems to be saying . . . that the statute does not even require that the defendant know that one or more performers was under the age of 18. . . . " (Pet. 9a-10a, 13a.) The Government's final position in the court of appeals was that "the scienter required was analogous to that required for obscenity convictions – general knowledge of the nature of the contents of the materials, not knowledge of the . . . age of the minor." (Pet. 13a.)

The Ninth Circuit rejected this analogy. It recognized that in *Hamling v. United States*, 418 U.S. 87 (1974), the Court held that it was not necessary to know the *legal* status of the material. But, the court stated, "[t]he question before us does not concern the defendant's requisite knowledge of the law; it concerns his knowledge of a

particular fact – the underage of the performer." (Pet. 14a.)

In concluding that the minimum constitutional requirement of scienter for the Act's proscription is knowledge that at least one of the performers is under 18, the court stated that the section "potentially applies to all kinds of recipients or distributors of videotapes and magazines," and "[t]o render them all prima facie criminals if one of the performers in a portrayal of sexually explicit conduct is under age, without the distributor's or recipient's knowledge, would be to create precisely the kind of chilling effect condemned by *Smith* [*v. California*, 361 U.S. 147 (1959)]." (Pet. 15a.) Finally, the court concluded that it could not construe section 2252 so as to save its constitutionality because to do so comes too close to "judicial rewriting of a statute." (Pet. 16a.)

Judge Kozinski dissented in part. He agreed that the word "knowingly" in section 2252 does not apply to the age of the person depicted, (Pet. 23a), and that the statute "must contain a *mens rea* requirement." (Pet. 17a.) He believed, however, that it was the court's duty to read the scienter requirement into the statute to render it constitutional, (Pet. 27a), even if "its drafters plainly had not meant to put it there." (Pet. 24a n.6).

SUMMARY OF ARGUMENT

1. a. The Ninth Circuit held, and the parties agree, that section 2252 would violate the First Amendment if it did not contain a scienter as to minority requirement. Accordingly, the central question is whether the word

"knowingly" in section 2252 applies to the minority of the person depicted.

Every canon of statutory construction supports the conclusion that the Court should start from the text of the statute. Plainly read, the word "knowingly" in section 2252 does not require knowledge of the minority of the performer. The adverb "knowingly" in section 2252(a)(1)(A) modifies the verbs "transports" and "ships," the interstate nexus requirement, and the phrase "visual depiction." The phrase "minor engaging in sexual conduct" occurs in an independent clause set off by indentations in an outline form. The independent clause, as written, is syntactically and visually distinct from the remainder of section 2252(a)(1)(A).[2] The Government acknowledges that this construction "may be correct grammatically," (Pet. 8), and until this case it consistently so read section 2252. *See, e.g., United States v. Kleiner*, 663 F. Supp. 43 (S.D. Fla. 1987); *United States v. Tolczeki*, 614 F. Supp. 1424 (N.D. Ohio 1985).

The text and structure of section 2252 are true to the legislative history: the reports of both Houses of Congress affirmatively and clearly reflect Congress' intent "not to include scienter as to minority as an element of the crime." *United States v. United States District Court*, 858 F.2d 534, 538 (9th Cir. 1988).

Since the text and legislative history of section 2252 plainly exclude scienter as to minority as an element of the crime, the Court is not free "to add a constraint to the

[2] Section 2252(a)(2) is the same except that it refers to a person who "receives" or "distributes."

statute that its drafters plainly had not meant to put there," as Judge Kozinski suggested, (Pet. 24a n.6), because the legislature, not the Court, is entrusted with the responsibility of defining the elements of federal crimes, which are solely creatures of statute. *Liparota v. United States*, 471 U.S. 419, 424 (1985). Where, as here, Congress has failed to "act within . . . applicable constitutional constraints in defining criminal offenses," *id.* at 424 n.6, the Court must declare the statute unconstitutional, notwithstanding its laudable objectives.

There is another compelling reason for declaring section 2252 unconstitutional. The Government concedes that Congress unquestionably and intentionally omitted knowledge of minority from section 2251, the section punishing those who produce and advertise child pornography, and it implicitly acknowledges that section 2251 is therefore unconstitutional: this creates the absurd result of having a federal statute punishing those who distribute and receive child pornography, but not those who produce and advertise it.

b. Section 2256's definition of "sexually explicit conduct of a minor" is broader than the definition of "sexual conduct" in the New York statute upheld in *New York v. Ferber*, 458 U.S. 747 (1982). The New York statute defined a minor as a person under 16 years of age, while section 2256(1) defines a minor as a person under 18 years of age. When Congress raised the statutory age to 18, it made "encroachment on protected expression broader than that considered in *Ferber*," and unlike the potential overbreadth described in *Ferber*, "the potential number of instances of [reaching constitutionally protected material] is not a 'tiny fraction' and the proper dividing line among

cases involving the definition of 'sexual conduct' is not so clear." *United States v. Kantor*, 677 F. Supp. 1421, 1431-32 (C.D. Cal. 1987).

Moreover, section 2256(2) is not limited to the kind of "hardcore" depictions defined in the New York law which *Ferber* found suitably limited and described. Section 2256(2)(E), for example, defines sexually explicit conduct as the "actual or *simulated lascivious exhibition* of the genitals or *pubic area* of any person" (emphasis added).

American Library Association v. Thornburgh, 713 F. Supp. 469 (D.D.C. 1989), *vacated as moot sub nom., American Library Association v. Barr*, 956 F.2d 1178 (D.C. Cir. 1972), found this definition overly broad and vague when it invalidated the record-keeping provisions of the Act (section 2257). Congress then amended section 2257 to exclude "lascivious exhibition of the genitals or pubic area." *Barr*, 956 F.2d at 1186 n.5. Senator Thurmond explained that this was done to comply with the district court's ruling in *Thornburgh*. *Barr*, 956 F.2d at 1186. It thus appears that Congress agrees that section 2256(2)(E) sweeps more broadly than is warranted by the evil at which it is aimed. *See Boos v. Barry*, 485 U.S. 312, 329 (1988) ("The claim that the [statute] is sufficiently narrowly tailored is gravely weakened; if ever it did so, Congress no longer considers this statute necessary . . . . Relying on congressional judgment in this delicate area we conclude that the . . . [statute] is not crafted with sufficient precision to withstand First Amendment scrutiny.").

2. The indictment does not charge respondents with distributing or receiving visual depictions knowing that

the person depicted was under age 18. Accordingly, the indictment would have to be dismissed, even if such knowledge is read into section 2252, as the Government urges.

3. Traci Lords was a married woman over 16 years of age when she made the videotapes respondents allegedly distributed and received. She held herself out as an adult, and the videotapes were marketed as adult entertainment, not "kiddie porn": the boxes containing the videotapes stated that all performers were over 18 years of age. The Government never alleged that the videotapes were obscene, and they are protected by the First Amendment if, as respondents claim, they are not child pornography.

ARGUMENT

I.

ON ITS FACE, AND AS APPLIED, 18 U.S.C. SECTION 2252 VIOLATES THE FIRST AND FIFTH AMENDMENTS BECAUSE IT DOES NOT CONTAIN A SCIENTER AS TO MINORITY REQUIREMENT.

The Ninth Circuit held, and the parties agree, that without a scienter-as-to-minority requirement, section 2252 would be unconstitutional. (*See* Br. for Gov't 39-40.) The central issue, therefore, is whether the word "knowingly" in section 2252, does or does not apply to the minority of the person depicted.

A. Section 2252 Does Not Require Knowledge Of Minority Status.

Plainly read, section 2252 does not require knowledge of minority status. It reads:

> (a) Any person who –
>
> (1) knowingly transports or ships in interstate or foreign commerce by any means including by computer or mails, any visual depiction, if –
>
> (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
>
> (B) such visual depiction is of such conduct; or
>
> (2) knowingly receives or distributes, any visual depiction that has been transported or shipped in interstate or foreign commerce by any means including by computer or mailed or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce or through the mails, if –
>
> (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
>
> (B) such visual depiction is of such conduct;

shall be punished as provided in subsection (b) of this section.[3]

The Ninth Circuit, relying on *United States v. Thomas*, 893 F.2d 1066, 1070 (9th Cir.), *cert. denied*, 498 U.S. 826 (1980), held that the word "knowingly" in section 2252 does not require that the defendant know that the expressive material transported or received involved a minor. (Pet. 10a.)

Judge Kozinski, dissenting in part, agreed that as a matter of simple statutory construction, section 2252 "does not apply to the age of the depicted children." (Pet. 23a.) *Thomas'* holding to this effect, he stated, "is not much more than we would learn by reading the statute

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[3] The Roth amendment, which Congress rejected, provided:

(a) No person may –

(1) knowingly transport, ship, or mail in interstate or foreign commerce for the purpose of sale or distribution for sale any film, photograph, negative, slide, book, magazine, or other print or visual medium depicting a minor engaged in sexually explicit conduct; or

(2) knowingly receive for the purpose of sale or distribution for sale, or knowingly sell or distribute for sale, any film, photograph, negative, slide, book, magazine, or other print or visual medium depicting a minor engaged in sexually explicit conduct which has been transported, shipped, or mailed in interstate or foreign commerce.

(Br. for Gov't 27.)

Much of the language of the Roth amendment found its way into § 2252, but with major structural changes – changes reflecting an acceptance of the Justice Department's recommendation that knowledge of minority be excluded as an element of the crime.

ourselves." (Pet. 23a-24a.) Judge Kozinski also agreed that section 2252 would violate the First Amendment if it omitted all knowledge of minority from the section. (Pet. 17a.)[4]

Grammatically and structurally, section 2252 is similar to 18 U.S.C. § 1001, the statute involved in *United States v. Yermian*, 468 U.S. 63 (1984). *Yermian* held that the words "knowingly and willfully" used in section 1001 did not modify the entire remainder of the clause in which they appeared. Rather, the Court stated, the words applied only to making "false or fraudulent statements or representations," and not to the phrase "in any matter within the jurisdiction of [a federal agency]." If Congress had intended the words "knowingly and willfully" to apply to the jurisdictional requirement, the Court stated, it would have inserted the phrase "knowing such statements to be in any matter within the jurisdiction of any federal agency." *Id.* at 73.

The same may be said for section 2252. Grammatically, the adverb "knowingly" used in section 2252(a)(1) modifies the verbs "transports" and "ships," the interstate nexus requirement, and the phrase "visual depiction." The phrase "minor engaging in sexual conduct" occurs in an independent clause set off by indentations

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[4] Judge Kozinski believed that a "recklessness" test would suffice, (Pet. 17a), but recognized that "[w]hich mental state to choose is not entirely clear," (Pet. 27a, n.8). Indeed, he was "not at all clear that a lesser state of mind such as negligence, would not suffice to save the statute." (Pet. 27a.) It is, of course, for Congress, not the Court, to decide "[w]hich mental state to choose."

and in outline form. The independent clause, as written, is syntactically and visually distinct from the remainder of section 2252.[5] If Congress had intended the word "knowingly" to apply to the minority of the person depicted, it would have drafted section 2252(a)(1)(A) to read:

> Any person who –
>
> (1) knowingly transports . . . any visual depiction, if –
>
> (A) *knowing that* the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct. . . .

The Government acknowledges that the Ninth Circuit's understanding of section 2252 "may be correct grammatically." (Pet. 8; Br. for Gov't 37-38.) Indeed, prior to this case, the Government consistently *did* read section

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[5] Because the use of the term "knowingly" is often troublesome, a rule of construction has developed to assist courts.

> [I]f commas set off certain words from the rest of the definition [placement of the *mens rea* element at the beginning of the sentence does not extend to the entire sentence]. For example suppose that a statute prohibits "intentional seizure of another [person] with intent to cause him, *without authorization of law* to be confined." The word "intent" probably should not be read to modify the italicized language because those words were set off from the rest of the statute. *See People v. Weiss*, 267 N.Y. 387, 12 N.E. 2d 514 (1983).

Joshua Dressler, *Understanding Criminal Law* section 10.05 n.3 (1987).

2252 as not requiring proof of knowledge of minority.[6] In *United States v. Kleiner*, 663 F. Supp. 43 (S.D. Fla. 1987), the court stated that it agreed "with the Government that the knowledge requirement under . . . section 2252 is not, as the defendants argue, whether the tape . . . was made using minors. . . . " *Id.* at 44.

In *United States v. Moncini*, 882 F.2d 401 (9th Cir. 1989), a case the Government relied heavily upon in the court of appeals, (Pet. 10a-11a), the court stated that at most the word "knowingly" in section 2252 can be construed to modify transports, ships or mails in conjunction with "any visual depiction [as defined by the statute]." Accordingly, the court said, "the Government must prove that the defendant had knowledge of the contents of the visual depictions and knowledge that they were to be mailed, but there is simply no reference to illegality in section 2252 which the word 'knowingly' could similarly be construed to modify." *Id.* at 405.

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[6] Even before the Act was amended in 1984, section 2252 was construed as not including a knowledge-of-minority requirement. Thus, in *United States v. Langford*, 688 F.2d 1088 (7th Cir. 1982), *cert. denied*, 461 U.S. 959 (1983), the jury was informed that it should convict if it found:

> 1. That on or about the date charged, the defendant knowingly mailed an item for the purpose of sale and distribution for sale.
> 2. That the item mailed was visual or print medium depicting sexually explicit conduct – [as defined under 18 U.S.C. section 2253(2)].
> 3. That the production of such a visual or print medium involved the use of a minor under the age of 16 engaging in sexually explicit conduct.
> 4. That the visual or print medium was obscene.

Id. at 1089 n.1.

In *Jacobson v. United States*, 112 S. Ct. 1535, 1545 (1992), Justice O'Connor, with whom the Chief Justice, Justice Kennedy, and Justice Scalia joined, dissenting, cited *Moncini* with approval stating that section 2252 "requires only knowing receipt of visual depictions produced by using minors engaged in sexually explicit conduct . . . . " *See also* Brief for the United States, pp. 18-19, *Knox v. United States*, 114 S. Ct. 375 (1993) ("The courts have held that the *mens rea* requirement in the statute is satisfied if a defendant is shown to know the nature and contents of the materials.").[7]

This understanding is in accord with the legislative history which reflects "that the defendant's knowledge of the age of the child is not an element of the offense but that the bill is not intended to apply to innocent transportation with no knowledge of the nature or character of the material involved." S. Rep. No. 438, 95th Cong., 1st Sess. 23-24 (1977) [hereinafter 1977 Senate Report].

The House and Senate Reports affirmatively and unambiguously reveal that Congress purposely omitted knowledge of the performer's minority as an element of the crime. *See District Court*, 858 F.2d at 538. A "report obviously does not have the force of law," but "when the text of a bill is not changed after it leaves the committee,

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[7] The Government now recognizes that this standard is constitutionally flawed. Accordingly, it disagrees, with two amici who "argue that proof of knowledge of a performer's minority is not essential." (Br. for Gov't 39.) The Constitution would not be satisfied if § 2252 were "interpreted to require scienter as to the sexually explicit nature of the materials distributed but not to requir[e] scienter as to minority." (Br. for Gov't 39-40 (inner quotations omitted).)

the Members are entitled to assume that the report fairly summarizes the proposed legislation." *City of Chicago v. Environmental Defense Fund*, 114 S. Ct. 1588, 1597 n.7 (1994) (Stevens, J., joined by O'Connor, J., dissenting).

Assistant Attorney General Patricia M. Wald, representing the Department of Justice, wrote a long analysis of the bill that ultimately became law to the Chairman of the Committee on the Judiciary, which letter was appended to the 1977 Senate Report. Discussing section 2251, she stated that, unless the word "knowingly" was deleted "the bill might be subject to an interpretation requiring the Government to prove the defendant's knowledge of everything that follows 'knowingly,' including the age of the child." The word "knowingly," she therefore suggested, should be deleted because it was "not the intention of the drafters to require the Government to prove that the defendant knew the child was under age 16 but merely to prove that the child was, in fact, less than age 16." In this respect, she stated, the bill would resemble that portion of the White Slave Traffic Act, which makes it an offense "knowingly to induce or coerce girls under the age of 18 to travel . . . for immoral purposes." Under that statute, "there is no requirement . . . that the Government prove the defendant knew the girl's age. *See United States v. Hamilton*, 456 F.2d 171 (3rd Cir. 1972)." 1977 Senate Report 23.

Addressing section 2252, Ms. Wald stated that the use of the word "knowingly" in that section was "appropriate to make it clear that the bill does not apply to common carriers or other innocent transporters who have no knowledge of the nature or character of the material they are transporting." To clarify the situation, she suggested

"the legislative history might reflect that the defendant's knowledge of the age of the child is not an element of the offense, but that the bill is not intended to apply to innocent transporters with no knowledge of the nature or character of the material involved." *Id.* at 23-24 (emphasis added). *See also* H.R. Rep. No. 696, 95th Cong., 1st Sess. 21-22 (1977) (statement of Deputy Assistant Attorney General John C. Keeney).

The conference committee accepted Ms. Wald's recommendation "with the intent that it is not a necessary element of a prosecution that the defendant know the actual age of the child." H.R. Rep. No. 811, 95th Cong., 1st Sess. 5 (1977) [Conference Report]. The Conference Report states that "it is the intent of the conference committee that if a minor has engaged in this sexually explicit conduct and there was a production of material using any printed or visual medium depicting such conduct that persons who knowingly transport, ship, or mail for the purpose of sale or distribution, or knowingly thereafter receive for sale or distribution, or knowingly thereafter sell or distribute for sale any such material, are liable whether or not they have contact with the minor or the original production of the material." *Id.* at 3.

The Government acknowledges that the House and Senate Reports could support respondents' argument that section 2252, as enacted in 1978, "did not require knowledge of a performer's minority." (Br. for Gov't 37.) It observes that the Conference Committee's revision of the Roth amendment, *see supra* note 3, to include the two requirements set off in subclauses (A) and (B) was to place the word "knowingly" a distance from the word "minor," possibly "to incorporate the approach suggested

by [Ms. Wald] in 1977." (Br. for Gov't 37.) This approach would impose a requirement that the distributor have knowledge of the material's nature and character, "but with no requirement that the distributor know that the performer was a minor. *See 1977 Senate Report* 27, 29 (letter of Assistant Attorney General Wald); *1977 House Report* 20, 22 (statement of Deputy Assistant Attorney General Keeney).") (Br. for Gov't 38.)

The critical language used in sections 2251 and 2252 is identical. Section 2251(c)(1) provides in relevant part:

> Any person who . . . knowingly . . . publishes . . . any notice or advertisement seeking or offering –
>
> (A) to receive . . . distribute, or reproduce any visual depiction, if the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct . . . . shall be punished.

Section 2252(a)(2) provides in relevant part:

> Any person who – . . . .
>
> (2) knowingly receives, or distributes, any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce . . . . if –
>
> (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
>
> (B) such visual depiction is of such conduct . . . . shall be punished . . . .

The Government acknowledges that "[t]he legislative history makes clear Congress' intent that knowledge of a performer's minority is not required under section 2251. See H.R. Rep. No. 696, 95th Cong., 1st Sess. 12 (1977); S. Conf. Rep. No. 601, 95th Cong., 1st Sess. 5; H.R. Rep. No. 811, 95th Cong., 1st Sess. 5 (1977)." (Br. for Gov't 20 n.13.) At the same time, it argues that the identical language in section 2252 does require knowledge of a performer's minority. It is settled, however, that language used in several places in a statutory scheme "is generally read the same way each time it appears," *Ratzlaf v. United States*, 114 S. Ct. 655, 660 (1994), and this is especially so here since the legislative history makes plain that that was Congress' intent.

Nevertheless, the Government argues that two remarks made on the floor trump the House and Senate Reports. (Br. for Gov't 28-29.) This is not the law. *See, e.g., Garcia v. United States*, 469 U.S. 70, 76 (1984) ("committee reports are 'more authoritative' than comments from the floor"). Moreover, neither of the floor statements relied upon by the Government supports its claim that Congress intended section 2252 to contain a knowledge of minority requirement. The Government first points to a floor colloquy between Senators Roth and Percy discussing the Roth amendment – an amendment that Congress rejected. Senator Roth is quoted as saying that the word "knowingly," "insures that only those sellers and distributors who are consciously and deliberately engaged in the marketing of child pornography . . . are subject to prosecution under this amendment." (Br. for Gov't 28.) This is hardly a statement that a defendant would have to know that the person depicted was a minor. Indeed, the statement more

likely means that a defendant would have to know the contents of the material. This *mens rea* would be in accord with the legislative history. *See* 1977 Senate Report 23-24.

The other statement was made by Representative Jeffords, who explained that in using the word "knowingly," "[w]e are talking about people knowing that it is the kind of stuff we are talking about not knowing they are just transporting [sic] a piece of material. It is intended that they have knowledge of the type of material being transported, that it contains the type of material proscribed by the bill." (Br. for Gov't 29.) It is difficult to see how this statement supports the Government's claim that Congress intended the word "knowingly" to apply to the minority of the performer.

Finally, the Government argues that, even if Congress affirmatively and deliberately omitted knowledge of minority from section 2252 in 1977, the 1984 amendments had the effect of inserting that requirement into section 2252. (Br. for Gov't 38-39.) This argument is meritless.

First, the 1984 amendments were silent concerning the word "knowledge." Second, the changes made in 1984 all had the purpose of making it easier for the prosecutor to obtain a conviction. Thus, for example, the amendments deleted the language that required that the materials be transported for the purpose for "sale or distribution for sale" in order to broaden the scope of the statute, and no longer required that the visual depiction be obscene but merely that it involve the use of a minor engaged in sexually explicit conduct. The amendments also raised the age of minority from 16 to 18, substituted the word "lascivious" for "lewd" in section 2256(2)(E),

and substituted "sadistic or masochistic abuse" for "sado-masochistic abuse (for the purpose of sexual stimulation)" in section 2256(2)(D). Finally, section 2252 had been authoritatively construed as not requiring knowledge of minority, in *United States v. Langford*, 688 F.2d 1088 (7th Cir. 1982), *see supra* note 6, prior to the 1984 amendments. Congress presumably was aware of this construction, *Lorillard v. Pons*, 434 U.S. 575, 580 (1978), and could have corrected the judicial understanding of section 2252 if it disagreed.

In the context of the changes made, it is irrational to believe that Congress silently amended section 2252 to require proof of knowledge of minority. Nevertheless, the Government speculates that because "the minority of the performer now separates conduct that is legal – indeed, protected by the First Amendment – from conduct that is criminal," (Br. for Gov't 38), it follows that in 1984 Congress intended section 2252 to now have a scienter of minority requirement, (Br. for Gov't 39). But Congress' silence on this issue speaks louder than the Government's speculation.

B. Without Scienter Of Minority, Section 2252 Violates The First And Fifth Amendments.

Section 2252 is extremely broad. For example, a person sending or receiving an art book containing a single depiction of "actual or simulated lascivious exhibition of the genitals or pubic area of any person," or actual or simulated "sexual intercourse," "bestiality," "masturbation," or "sadistic or masochistic abuse" is guilty of the crime of child pornography, if the depiction happens to

be of a person under 18 years of age.[8] It is for this reason that the Ninth Circuit concluded that "the constitutional minimum requirement of scienter for the Act's proscription of transporting or receiving child pornography is knowledge that at least one of the performers is under 18 years of age." (Pet. 14a.) Citing *Smith v. California*, 361 U.S. 147 (1959), the court stated "it would undoubtedly chill the distribution of books and films if sellers were burdened with learning not only the content of all of the materials they carry but also the ages of the actors with whom they have no direct contact." (Pet. 15a (quoting *District Court*, 858 F.2d at 543-44 n.6).)

The court observed that section 2252 "potentially applies to all kinds of recipients or distributors of videotapes and magazines," and that "[t]o render them all prima facie criminals if one of the performers in a portrayal of sexually explicit conduct is underage, without the distributor's or recipient's knowledge, would be to create precisely the kind of chilling effect condemned by *Smith*." (Pet. 15a.)

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[8] "Many of the world's great artists – Degas, Renoir, Donatello, to name but a few – have worked from models under 18 years of age, and many acclaimed photographs and films have included nude or partially clad minors." *Massachusetts v. Oakes*, 491 U.S. 576, 591 (1989) (Brennan, J., joined by Marshall & Stevens, JJ., dissenting). *See, e.g.*, Richard Marshall, *Robert Mapplethorpe* (Whitney Museum of American Art 1988); *Photographs of Jock Sturges: The Last Day of Summer* (Aperture 1991); Sally Mann, *Immediate Family* (Aperture 1992); Stephanie Barron, *Degenerate Art: The Fate of the Avant-Garde in Nazi Germany* (Los Angeles County Museum of Art 1991).

The Government agrees. It notes that regulating the content of nonobscene magazines or videotapes is ordinarily proscribed by the First Amendment, and that "so long as the materials at issue are not obscene, the minority of a single performer can be the difference between conduct that is proscribed by section 2252 and conduct that is constitutionally protected." (Br. for Gov't 19.) Since distribution or receipt of nonobscene materials that include visual depictions of "sexually explicit conduct" as defined in section 2256(2) is not in itself unlawful "the minority of the performer involved is the fact that renders the act illegal." (Br. for Gov't 42-43.)

Accordingly, the Government disagrees with amici who, "while acknowledging that section 2252 requires some form of scienter – and therefore does not apply to persons who are unfamiliar with the contents of proscribed materials – argue that proof of knowledge of a performer's minority is not essential." (Br. for Gov't 39-40.)

In an obscenity prosecution, the Government explained, a defendant who knows the contents of the materials in question knows all the facts that are relevant to the verdict of the judge or jury; extrinsic evidence regarding the circumstances under which visual depictions were produced simply does not bear on the question whether they are obscene." (Br. for Gov't 43.) On the other hand, "[m]aterials proscribed by section 2252 are characterized not simply by their depiction of sexually explicit conduct, but by the minority of the performer depicted therein." (Br. for Gov't 44.) And, it is the minority of the performer "that renders the act illegal." (*Id.*)

C. Congress, Not The Court, Must Define Federal Crimes.

Contrary to Judge Kozinski's "constitutional narrowing" theory, the Court is not free "to add a constraint to [a] statute that its drafters plainly had not meant to put there," (Pet. 24a n.6), to avoid declaring a statute unconstitutional. "Any other conclusion . . . would trench upon the legislative Powers vested in Congress by art. I, § 1 of the Constitution." *United States v. Locke*, 471 U.S. 84, 95 (1985). Moreover, "the definition of the elements of a criminal offense is entrusted to the legisiature, particularly in the case of federal crimes, which are solely creatures of statute," *Liparota*, 471 U.S. at 423, and Congress "must act within any applicable constitutional constraints in defining criminal offenses," *id.* at 424 n.6.

It is of course true, as the Government argues, that the Court will often strain to construe legislation so as to save it against constitutional attack, but it is also true that "it must not and will not carry this to the point of . . . judicially rewriting it. . . . " *Aptheker v. Secretary of State*, 378 U.S. 500, 515 (1964) (statute found unconstitutional on its face because the case involved freedom of travel, "a constitutional liberty closely related to rights of free speech and association"). *See Blount v. Rizzi*, 400 U.S. 410, 419 (1971) ("It is for Congress, not this Court, to rewrite the statute."); *United States v. Bass*, 404 U.S. 336 (1971) (Because a criminal offense "represent[s] the moral condemnation of the community, legislatures, and not courts, should define criminal activity.").

Where, as here, Congress has deliberately and clearly enacted a law that is overbroad, in the sense of restricting more speech than the Constitution permits, the statute must be stricken, *see R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2542 n.3 (1992), and declaring it unconstitutional serves as a forceful reminder to Congress to legislate narrowly – if at all – when criminalizing the circulation of all forms of presumptively protected expressive materials. *See Massachusetts v. Oakes*, 491 U.S. at 586 (opinion of Scalia, J., speaking for the Court on this point).[9]

The Government's defense of section 2252 ultimately comes down to its reliance on a variety of canons of statutory construction.[10] But all the cases cited by the Government unequivocally state that courts should not invoke these canons of construction to reach a result

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[9]With respect to legislation that tends to stir deep emotions (e.g., the regulation of child pornography) . . . the threat of an overbreadth invalidation may sometimes be important, at least for some legislators. It is at least plausible to think that in such cases legislators may be tempted to overreach, possibly because they consciously believe that the Supreme Court has erred in over protecting anti-social conduct. They may also, however, be sufficiently concerned with the consequences of overreaching – in the form of foregone opportunities to regulate and punish anti-social conduct – to alter their voting dispositions in light of First Amendment overbreadth doctrine.

Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 Yale L.J. 853, 888-89 n.221 (1991).

[10] "As Professor Llewellyn famously illustrated, many of the traditional canons have equal opposites." *Landgraf v. USI Film Prods.*, 114 S. Ct. 1483, 1496 (1994) (footnote omitted).

"plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

The Government's reliance on *Morissette v. United States*, 342 U.S. 246 (1952), *Liparota*, and *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978), (Br. for Gov't 13), is misplaced. It is true that criminal statutes ordinarily are presumed to require scienter, (Br. for Gov't 12-16), and that "the failure of Congress explicitly and unambiguously to indicate whether *mens rea* is required does not signal a departure from this background assumption of our criminal law," (Br. for Gov't 13 (quoting *Liparota*, 471 U.S. at 426).) It is also true that in general, "far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement." (Br. for Gov't 13 (quoting *United States Gypsum*, 438 U.S. at 438 (1978)).) Finally, it is true that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity," and that on a number of occasions the Court has "read a state of mind component into an offense even when the statutory definition did not in terms so provide." (Br. for Gov't 13 (inner quote and citations omitted).) These statements hardly prove the Government's case, however.

First, courts *have* found a *mens rea* in section 2252, although it is not knowledge of minority. *Moncini*, for example, concluded that the word "knowingly" in section 2252 can be construed to modify transport, ships or mails in conjunction with "any visual depiction [as defined by the statute]." Under this construction, "the Government must prove that the defendant had knowledge of the

contents of the visual depictions and knowledge that they were to be mailed." With this scienter requirement, section 2252 would not reach "a post office employee who 'knowingly distributes' mail but knows nothing of its contents, or a film developer who for some reason returns an undeveloped role of film to a customer." *United States v. Gendron*, 18 F.3d 955, 959 (1st Cir. 1994).

Second, when Congress excluded knowledge of minority from section 2252 it was not an oversight, it was not a "simple omission of the appropriate phrase from the statutory definition." *United States Gypsum*, 438 U.S. at 438. Knowledge of minority was deliberately excluded from sections 2251 and 2252. The Government's argument that the phrase was deliberately omitted from section 2251, but accidently omitted from section 2252, finds no support in the text of the section or its legislative history.

Finally, the Government's reliance on the doctrine of lenity, (Br. for Gov't 13), is novel, ironic, and inappropriate. Lenity comes into operation only " 'at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers.' " *Chapman v. United States*, 500 U.S. 453, 463 (1991) (quoting *Callanan v. United States*, 364 U.S. 587, 596 (1961)). Moreover, lenity has been used to spare defendants from punishment, but never (to respondents' knowledge) to *uphold* a criminal conviction. *See Hughey v. United States*, 495 U.S. 411, 422 (1990) (lenity principles "demand resolution of ambiguities in criminal statutes in favor of the defendant").

In this case, Congress has deliberately and unequivocally excluded knowledge of minority – "the moral and

criminal heart of the matter," *Gendron*, 18 F.3d at 959 – as an element of the crime. As a consequence, section 2252's overbreadth is "not only . . . real, but substantial as well, judged in relation to the statute's . . . legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). Because the section is excessively overbroad, the Court has "no choice but to strike it down on its face, notwithstanding its laudable objectives." *Massachusetts v. Oakes*, 491 U.S. at 590 (Brennan, J., joined by Marshall & Stevens, JJ., dissenting).

II.

THE DEFINITION OF SEXUALLY EXPLICIT CONDUCT OF A MINOR IS UNCONSTITUTIONALLY VAGUE AND BROAD.

Section 2252 is a blanket prohibition; it brooks no exceptions. Unlike the statute in *Osborne v. Ohio*, 495 U.S. 103, 105 (1990), there is no exception "for bona fide artistic, medical, scientific, educational, religious, governmental, or judicial material," or "for the proper use of material by physicians, psychologists, sociologists, scientists, teachers, librarians, clergymen, prosecutors, judges, or other persons having a proper interest in the material." Nor is there an exception, as in *Oakes*, "for a bona fide scientific or medical purpose, or for an educational or cultural purpose for a bona fide school, museum or library." 491 U.S. at 577.

As the Ninth Circuit stated, "section 2252 potentially applies to all kinds of recipients or distributors of videotapes and magazines," (Pet. 15a), and it would reach everyone who, for example, knows the contents of the

works mentioned, *supra* note 8, and who knowingly transports or receives the work.

Additionally, the definition of "sexually explicit conduct" set forth in section 2256(2) is much broader than one might expect and it is much broader than the definition of "sexual conduct" used in the New York statute upheld in *Ferber*. *See United States v. Kantor*, 677 F. Supp. at 1430. *Kantor* concluded that the application of the statute to persons 16 and 17 years old, and the broad definition of sexually explicit conduct, rendered the Act overbroad. It concluded that the statute should be struck down facially, and that Congress should be sent back to the task of designing a statute, the reach of which is more clearly limited to the protection of children. *Id.* at 1432. It declined to do so, however, "at least until such time as a case is presented in which the alleged overbreadth of the statute is urged by someone affected by it." *Id.* at 1432.

A. Section 2256(2)(E) Is Vague And Overbroad.

Section 2256(2)(E) defines "sexually explicit conduct" as meaning "actual or simulated lascivious exhibition of the genitals or pubic area of any person." Prior to the 1984 amendments the word "lewd" was used instead of "lascivious." Congress made the change because

> "lewd" has in the past been equated with "obscene"; this change is intended to make it clear that an exhibition of a child's genitals does not have to meet the obscenity standard to be unlawful.

130 Cong. Rec. S3510, S3611 (daily ed. Mar. 30, 1984) (remarks of Sen. Spector).

The statute upheld in *Ferber* defines "sexual conduct" as "actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals." *Ferber*, 458 U.S. at 751. The Court identified this definition with the one given in *Miller v. California*, 413 U.S. 15 (1973). *Miller* made plain that "no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive *'hardcore'* sexual conduct." *Id.* at 27 (emphasis added). *Miller* and its progeny used the term "hardcore" to fix the substantive constitutional limitation on the type of material that could be found to be beyond the protection of the First Amendment. In *Jenkins v. Georgia*, 418 U.S. 153 (1974), for example, the Court reversed an obscenity conviction stating that the film involved was not "hardcore sexual conduct," and that "as matter of constitutional law," it is not "outside the protection of the First and Fourteenth Amendments. . . . " *Id.* at 161.

Section 2256(2)(E) is not confined to "hardcore" sexual conduct. Indeed, its key words are undefined. Because the statute does not define, for example, what the word "lascivious" means, jurors are told that they "must use their common sense in deciding whether the pictures are lascivious . . . . " *United States v. Arvin*, 900 F.2d 1385, 1391 (9th Cir.), *cert. denied*, 498 U.S. 1024 (1990). The factors jurors are regularly told to consider are "whether the pictures are intended or designed to elicit sexual response from the viewer"; "whether the picture portrays the child as a sexual object"; "whether the child is depicted in an unnatural pose, considering the age of

the child"; "whether the picture suggests sexual coyness or willingness to engage in sexual activity"; "whether the setting is sexually suggestive"; "whether the focal point of the pictures is on the child's genitals or pubic area"; "[t]he captions on the pictures." *Id.* at 1390-91 n.4.

After examining the construction given section 2256(2)(E), the court in *American Library Association v. Thornburgh*, 713 F. Supp. 469 (D.D.C. 1989), *vacated as moot sub nom., American Library Association v. Barr*, 956 F.2d 1178 (D.C. Cir. 1992), concluded that "it is fair to conclude that any frontal nude image of a person in what might otherwise be called an 'erotic' pose is likely to be included as 'lascivious,' " and that "it is often difficult, if not impossible, to determine from looking at a nude image whether the performer is at least 18 years of age." *Id.* at 480. Accordingly, the court declared section 2257 of the Act (the record-keeping provision) unconstitutional because it was not narrowly tailored to ban only child pornography. *Id.* at 477.

Congress then amended section 2257 by narrowing the definition of "sexually explicit conduct" to exclude "lascivious exhibition of the genitals or pubic area." *Barr*, 956 F.2d at 1186 n.5. The amendment was made so that the statute would comply with *Thornburgh*. *Id.* at 1186; *see* 136 Cong. Rec. S9029 (daily ed. June 28, 1990) (statement of Sen. Thurmond). It thus appears that Congress concluded that section 2256(2)(E) was not crafted with sufficient precision to withstand First Amendment scrutiny. *See Boos v. Barry*, 485 U.S. 312, 329 (1988) ("The claim that the [statute] is sufficiently narrowly tailored is gravely weakened; if ever it did so, Congress no longer considers this statute necessary. . . .

Relying on congressional judgment in this delicate area we conclude that the . . . [statute] is not crafted with sufficient precision to withstand First Amendment scrutiny.").

Like the statute declared unconstitutional in *Boos*, section 2256(2)(E) is not sufficiently narrowly tailored to withstand First Amendment scrutiny. Nevertheless, section 2256(2)(E) still defines "sexually explicit conduct" for purposes of determining whether a person has violated section 2252.

B. Section 2256(2)(D) Is Vague And Overbroad.

Section 2256(2)(D) defines "sexually explicit conduct" as meaning "actual or simulated sadistic or masochistic abuse." Prior to the 1984 amendments, it was defined as "sado-masochistic abuse (for the purpose of sexual stimulation)."

When the bill was under consideration in 1977, Assistant Attorney General Wald observed that "sadism" and "masochism" are "broad enough to cover activities which are not necessarily sexually oriented," because "[t]hey could include filmed episodes of physical mistreatment of orphans, child laborers or inmates of a juvenile detention facility or a child inflicting injury upon himself." 1977 Senate Report 22. Since such portrayals would have virtually no sexual appeal, she stated, these terms "should be modified to refer to sexually oriented sadism and masochism." *Id.* at 22. The 1977 Act accordingly put in the words "(for the purpose of sexual stimulation)" following the words "sado-masochistic abuse." When in 1984 Congress substituted "sadistic or masochistic abuse" for

"sado-masochistic abuse" and *deleted* the words "(for the purpose of sexual stimulation)," it greatly expanded the reach of the section and rendered it vague and overbroad.

C. Section 2256(1) Sweeps More Broadly Than Is Warranted By The Evil At Which The Statute Aims.

Section 2256(1) defines a minor as "any person under the age of 18 years." The 1977 Act defined a minor as a person under 16 years of age, as did the New York statute upheld in *Ferber*.

Comments on the floor reveal that the legislation was intended to reach young children, specifically those under the age of 16 who were deemed incapable of consent. Senator Goldwater stated, "when I say children, I'm talking about children under 10 years of age or in their early teens." 123 Cong. Rec. 33,049 (1977). Senator Morgan stated, "reliable evidence indicates that children as young as three and four or five are routinely involved in this sickening enterprise. . . . Many slightly older children, age 12 or 13 or 14, who become involved in pornographic films, are runaways . . . . " *Id.* at 33058.

The reason for raising the age of minority to 18 is set forth in H.R. Rep. No. 516, 98th Cong., 2nd Sess. 3 (1984):

> The committee concluded that the age of the children encompassed by the Act should be increased from 16 to 18 years. The prosecution for distribution are most often based solely on the pornography which is the subject of the offense; the children cannot be located. Based on the pictures alone, the prosecution must show

> that the child is under the age of 16. This is extremely difficult once the child shows any sign of puberty. Raising the age to 18 which would facilitate the prosecution of child pornography cases and raise the effective age of the protection of children from these practices, probably not to 18 years of age, but perhaps to 16.

The House Report reveals that Mark M. Richards, Deputy Assistant Attorney General, advised the Judiciary Committee that the Administration's proposed bill did not suggest that the age of minority be raised from 16 to 18; that the New York statute involved in *Ferber* defined a minor as a person under 16 years age; and that by extending the reach of the Act to 16 and 17 years olds, it would reach persons "whom for some purposes society regards as adults." *Id.* at 14. But he added "[i]f the law were amended to protect minors under the age of 18, rather than 16, it would be easier to prosecute cases in which 14 or 15 year olds have been sexually exploited, but regarding whom actual proof of age is not available."

Congress' action in raising the age of minority to 18 years of age is doubly flawed. First, when the statute is applied to 16 and 17 year old persons, its overbreadth "is not limited simply to situations which are rare and insignificant." *Kantor*, 677 F. Supp. at 1432. Second, since the reason for raising the age of minority is not compelling, it "is not crafted with sufficient precision to withstand First Amendment scrutiny." *Boos*, 485 U.S. at 329.

While the Government may regulate the content of constitutionally protected speech in order to promote the

compelling interest of protecting the physical and psychological well-being of minors, " 'it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms.' " *Sable Communications, Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989) (quoting *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980)). "It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends." *Id.*

III.

IN NO EVENT SHOULD RESPONDENTS' CONVICTION BE AFFIRMED.

A. Throughout the proceedings, respondents argued that the indictment was fatally defective because it did not allege that they knew the person depicted was under 18 years of age. They argued that even if section 2252 were rewritten, "the indictment would still be fatally defective because it does not allege that defendants knew Traci Lords was under 18 years of age. *Russell v. United States*, 369 U.S. 749, 771 (1962); *Stirone v. United States*, 261 U.S. 212, 218 (1960) . . . . " (JA 157.) The Ninth Circuit did not address this issue, "[i]n light of [its] ruling on the constitutionality of the Act." (Pet. 4a n.3.) Accordingly, if the Court fails to hold section 2252 unconstitutional on its face, it should dismiss the indictment, *see Turner v. City of Memphis*, 369 U.S. 350 (1962), or it should remand the case to the court below to resolve the issue.

B. Because the Ninth Circuit concluded that section 2252 was unconstitutional on its face, it did not reach

respondents' argument that the Traci Lords tapes were not "child pornography." Traci Lords was a married woman over 16 years of age when she made the videotapes respondents distributed and received. She held herself out as an adult, and the videotapes were marketed as adult entertainment, not "kiddie porn." (JA 140.) On seeking employment as a performer, Ms. Lords provided a California driver's license, a U.S. passport and a birth certificate showing her to be over 18 years of age. (JA 142.) She showed these identifications to Penthouse, before it published her picture in its September 1984 issue. (JA 143.) The Government never alleged that the videotapes were obscene, and they are protected by the First Amendment if, as respondents claim, they are not child pornography.

This issue should be remanded to the court below if the statute is not declared unconstitutional on its face, or if the indictment is not found to be constitutionally defective.

CONCLUSION

For the aforesaid reasons, the Court should affirm the Ninth Circuit's judgment herein.

Respectfully submitted,

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